

**United States Postal Service and National Postal Mail Handlers' Union, Local 300, Division of L.I.U.N.A., AFL-CIO, CLC. Case 29-CA-15550(P)**

October 22, 1992

**ORDER GRANTING MOTION**

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On April 15, 1992, Administrative Law Judge D. Barry Morris of the National Labor Relations Board issued his Decision and, on the same date, the proceeding was transferred to and continued before the Board in Washington, D.C. Subsequently, the Respondent filed exceptions and a supporting brief to the judge's decision and counsel for the General Counsel filed a cross-exception and answering brief to the Respondent's exceptions. An answering brief to the General Counsel's cross-exceptions was due on June 10, 1992. On June 10, Respondent's counsel deposited the document in the mail for next day delivery. On June 11, 1992, the Respondent's answering brief was received. By letter dated June 16, 1992, the Respondent's answering brief was rejected as untimely filed.

Thereafter, on June 22, 1992, the Respondent filed a motion for enlargement of time to file answer and reply. The Respondent submits that the miscalculated due date of June 11 was placed on counsel's litigation calendar before going on vacation and that on his return, relying on the incorrect due date reflected on his calendar, counsel prepared and submitted the Respondent's answer by overnight mail on June 10. The Respondent contends that Section 102.111(c) provides for late filing for "excusable neglect," upon good cause shown, when no undue prejudice would result; that the courts have liberally construed "excusable neglect" under Federal Rules of Civil Procedure 6(b); that the key element in determining "excusable neglect" is the lack of prejudice; and that, in the absence of prejudice, "excusable neglect" may be established by demonstrating that untimely filing occurred as a result of clerical errors or similar inadvertent actions. The Respondent further argues that the circumstances leading to its late-filed answering brief clearly satisfy the requirements of Section 102.111(c).

The Board having considered the matter, accepts the Respondent's answering brief as timely filed.<sup>1</sup>

Our dissenting colleague does not dispute the fact that no prejudice will result from our acceptance of the brief 1 day after the due date. In his view, a tardy document should be accepted only if the party "dem-

onstrates that it undertook *careful* efforts to adhere *assiduously* to our filing requirements." (Emphasis added.) In our view, our colleague has ignored the provisions of Section 102.111(c). That section expressly provides that a tardy document can be accepted even if the party is guilty of *neglect*. It would seem that a party guilty of neglect is *not* one who has been careful to assiduously adhere to the rule. And yet, under the rule, the Board can accept that party's late document. Thus, our colleague has eviscerated the rule.

The real issue, under the language of the rule, is whether the neglectful conduct is "excusable." In our view, a "one-day" arithmetic error in the calculation of a due date is not so inexcusable as to warrant the rejection of the document, at least where, as here, there has been no prejudice to any party.<sup>2</sup> Accordingly,

IT IS ORDERED that the Respondent's motion is granted and the Respondent's brief be forwarded to the Board for consideration.

MEMBER OVIATT, dissenting.

Contrary to my colleagues, I would deny the Respondent's motion for enlargement of time to file answer and reply brief based on its miscalculation of the due date as it fails to satisfy the "excusable neglect" requirements of Section 102.111(c) of the Board's Rules and Regulations.<sup>1</sup>

Before adopting Section 102.111(c), the Board followed the strict rule that answers to backpay specifications, exceptions, motions, and briefs had to be received in hand by the due date. This rule made no provision for accepting late-filed documents; they were to be rejected. In practice, however, the Board carved out exceptions when it found that late filings were justified. See, e.g., *St. Bernadette's Nursing Home*, 234 NLRB 835 fn. 1 (1978) (filings mailed before due date accepted even though they arrived late, because, "in the normal course, they would have been delivered," on the due date); *Magic Chef*, 181 NLRB 1136 fn. 1 (1970), *enfd.* 443 F.2d 374 (6th Cir. 1971) (where brief in support of exceptions timely filed, exceptions filed more than 2 weeks late accepted because failure

<sup>2</sup> Contrary to the assertion of our colleague, we do not believe that we have unfairly "parsed" the language of the rule. We have simply pointed out that neglectful conduct does not necessarily result in the rejection of the tardy document. Some neglectful conduct will be excused. For the reasons stated above, we do not believe that the conduct in this case is so inexcusable as to warrant rejection of the document. We do not go beyond the facts of this case. Thus, contrary to the assertion of our colleague, our holding does not permit "wholesale exemptions" to the Board's requirements.

<sup>1</sup> Sec. 102.111(c) provides, in pertinent part, that:

In unfair labor practice proceedings, motions, exceptions, answers to a complaint or a backpay specification, and briefs may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result.

"Excusable neglect" is an undefined term that will be determined on a case-by-case basis.

<sup>1</sup> On July 10, 1992, the Board notified the parties by letter that the Respondent's motion for enlargement of time to file answer and reply had been granted (Member Oviatt dissenting), and that this Order Granting Motion would follow.

to timely file was an “oversight,” and no prejudice resulted). As exceptions were inconsistently granted, however, the Board’s rule became characterized by some as a “sometimes-yes, sometimes-no, sometimes-maybe policy of due dates.” *NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984).

In order to eliminate the appearance of arbitrariness, while providing a formal basis for accepting certain late-filed documents in unfair labor practice cases, the Board adopted Section 102.111(c). Although Section 102.111(c) codifies exceptions to the strict timeliness rule, it does not eviscerate it. Indeed, in my view, Section 102.111(c) should be narrowly construed. Only when a party demonstrates that, despite its assiduous attempts to comply with the Board’s Rules and Regulations, it has missed the filing date, should “excusable neglect” be found.

Thus, where a party acts timely and diligently but the filing is late because of support staff errors, I have agreed with my colleagues that “excusable neglect” is established. Examples of what I consider to be “excusable neglect” include the failure of clerical staff to follow instructions, reasonable confusion arising from a rejected extension request, and unforeseeable events like illness in the family.

Where, however, the late filing results solely from the inattention of the party’s counsel, I would not find “excusable neglect.” Here, the due date of the Respondent’s answering and reply brief was easily calculable under the Board’s Rules and Regulations. Sole-

ly due to counsel’s inattention, the due date was miscalculated and entered on the counsel’s calendar prior to his going on vacation. Compounding this error, on his return from vacation counsel failed to verify the due date. In these circumstances, the Respondent’s failure to timely file its answering brief resulted from its counsel’s failure to accord our Rules their proper weight. Under such circumstances, counsel should not now be permitted to invoke “excusable neglect” as a safety-net. In my view, late-filed documents should be accepted under Section 102.111(c) only in those limited circumstances where the party demonstrates that it undertook careful efforts to adhere assiduously to our filing requirements.<sup>2</sup>

I find neglect here, but I do not excuse it. To rule otherwise returns us, in my view, to a perception of arbitrariness and unequal treatment which, while not present, does damage to the Board’s reputation for fairness and equality of treatment.

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<sup>2</sup>I cannot accept by colleagues’ allegation that I have “eviscerated” Sec. 102.111(c) by narrowly interpreting “excusable neglect.” This rhetoric, in my view, is unfortunate, and clouds the otherwise legitimate disagreement between the majority and myself. Thus, unlike my colleagues, I would not parse the language of Sec. 102.111(c) in order to treat “excusable” and “neglect” as separate elements, thereby permitting wholesale exceptions to the Board’s time-filing requirements. They, in fact, define “excusable neglect” as all that is not “so inexcusable as to warrant rejection.” I view “excusable neglect” as an integrated term which I would construe narrowly, particularly, as here, against counsel demonstrating little diligence in complying with the Board’s filing requirements.